IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 456 OF 2004
IN
APPEAL NO. 745 OF 2001
IN
CHAMBER SUMMONS NO. 1203 of 2000
IN
SUIT NO. 1578 OF 1981

M/s. Kiran Construction Company, Mumbai .. Appellant
V/s.
Jagannath Sowar Vaity and Ors. .. Respondents
And
Smt. Geeta Rangannath Samant & Ors. .. Proposed Respondents

WITH
CHAMBER SUMMONS NO. 457 OF 2004
IN
APPEAL NO. 747 OF 2001
IN
CHAMBER SUMMONS NO. 2700 OF 1999
IN
SUIT NO. 1578 OF 1981

M/s. Kiran Construction Company .. Appellant
V/s.
Jagannath Sowar Vaity & Ors. .. Respondents
And
Smt. Geeta Ranganath Samant & Ors. .. Proposed Respondents

WITH
CHAMBER SUMMONS NO. 458 OF 2004
IN
APPEAL NO. 748 OF 2001
IN
CHAMBER SUMMONS NO. 140 OF 1999
IN
SUIT NO. 1578 OF 1981

M/s. Kiran Construction Company .. Appellant
V/s.
Jagannath Sowar Vaity and Ors. .. Respondents
And
Smt. Geeta Ranganath Samant & Ors. .. Proposed Respondents

Mr. U.J. Makhija i/b. M/s. Mulla & Mulla for the Appellant

Mr. T.N. Subramaniam with Ms. Snehal K. Shah i/b. Mr.

Shankar V. Mhatre for the Respondent No. 1 to 4 C and 17.

Mr. N.G. Thakker with Mr. P.N. Modi i/b. Mr. N. Janardhan for the Respondent No. 13 A to 13 E and 14.

CORAM : S. RADHAKRISHNAN &
J.P. DEVADHAR, JJ.
DATED : 10.03.2005

P.C.:-

1. By the above three Chamber Summonses, the Appellants are seeking to bring on record the legal heirs of Respondents Nos. 6, 8, 9 and 10. The Chamber Summonses are strongly opposed by the learned counsel for the Respondents.

2. All the above three Appeals were admitted on 5th September, 2001. At the time of admission of the above Appeals, no one had appeared on behalf of the abovementioned Respondents Nos. 6, 8, 9 and 10. Even after admission of the above three Appeals in the year 2001, no notice of the same were served on the abovementioned Respondents.

3. When the above three Appeals came up for final hearing, this Court by its order dated 30th January, 2004, had directed the Appellants to serve the Memo of Appeal on all the unserved Respondents within a period of six weeks. There is no dispute that no Advocate is appearing for the aforesaid Respondents ever since 2001.

4. It is the case of the Appellants that the Memo of Appeal was served on the aforesaid Respondents by their

Advocate's letter dated 6th August' 2001, however the acknowledgment of the same could not be traced in the office of the Advocates, as there was some shifting of some records in the office of the Advocate, and in that process the said acknowledgment was misplaced.

5. In pursuance of the above order dated 30th January' 2004, the Appellants state that they sought to serve the aforesaid Respondents with the Memo of Appeal with the Advocate's letter dated 25th February' 2004, at which time the Appellants came to know of the death of the aforesaid Respondents.

6. Perusal of the affidavit of Bharat Karsondas Thakkar, the Respondent No. 14 hereinabove, dated 1st June' 2004, clearly indicates that Respondent No. 8 died on 25th June' 1984, Respondent No. 9 died on 4th June' 1991 and Respondent No. 10 seems to have died prior to 1999. It appears that even Respondent No. 6 had died prior to 2001. There is no dispute that the Advocates of the Appellants were served with a copy of the Written Statement of Respondents Nos. 1 to 4 C dated 24th June' 1999, in the Suit, on 24th June' 1999 wherein it is clearly mentioned that Respondent No. 10 had died prior to 1999 and that the Suit against him stood abated as no legal heirs have been brought on record.

7. Shri Makhija, the learned counsel for the Appellants submitted that as the acknowledgment of service in the

above Appeal against the aforesaid Respondents were misplaced in the Advocates office, as such, pursuant to this Court's order dated 30th January' 2004, the Appellants had sought to serve the aforesaid Respondents through the Advocate's letter dated 25th February' 2004, at which time the Appellants came to know of the death of the aforesaid Respondents. Hence the learned counsel for the Appellants submitted that in the larger interests of justice the above Chamber Summonses should be allowed. Shri Makhija contended that the Appellants taken all diligent steps to bring the legal heirs of the aforesaid Respondents.

8. Shri Subramaniam, the learned counsel for the Respondents 1 to 4 C and 17, strongly opposed the grant of the above Chamber Summonses. He pointed out that even all the proposed Respondents in the present Chamber Summonses being the legal heirs of the aforesaid Respondents have not been properly served. He pointed out that the proposed Respondents 3 to 5 have been served on one Mrs. Shaikh, which is contrary to the provisions of Order 5 Rule 15 of the Code of Civil Procedure as applicable State of Maharashtra, in the sense the same ought to be served on a male member of the family, if it is on behalf of someone else, there is also no proper service on proposed Respondents 7 to 11. Shri Subramaniam pointed out that there is no dispute that the Advocates for Appellants were aware from 24th June' 1999, that Respondent No. 10 had died prior to that date, as

the same was clearly mentioned in the Written Statement of Defendants 1 to 4 C, but no steps have been taken for nearly 5 years.

9. Shri Subramaniam, strongly relied on a judgment of the Supreme Court in **Union of India v. Ram Charan, AIR 1964 SC 215** especially paragraphs 8, 9, 12 and 13, which read as under:-

> (8) There is no question of construing the expression 'sufficient cause' liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement.
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> (9) It is true, as contended, that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the opposite party, but it does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the law. Rule 9 of O. XXII of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death

of the opposite party is not sufficient. He had to state reasons which, according to him, led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit.

(12) The consequence of the abatement of the suit against the defendant is that no fresh suit can be brought on the same cause of action. Sub-rule (1) of R. 9 bars a fresh suit. The only remedy open to the plaintiff or the person claiming to be the legal representative of the deceased plaintiff is to get the abatement of the suit set aside and this he can do by making an application for that purpose within time. The Court will set aside the abatement if it is proved that the applicant was prevented by any sufficient cause from continuing the suit. This means that the applicant had to allege, and establish facts which, in the view of the Court, be a sufficient reason for his not making the application for bringing on record the legal representatives of the deceased within time. If no such facts are alleged, none can be established and, in that case the Court cannot set aside the abatement of the suit unless the very circumstances of the case make it so obvious that the Court be in a position to hold that there was sufficient cause for the applicant's not continuing the suit by taking necessary steps within the period of limitation. Such would be a very rare case. This means that the bare statement of the applicant that he came to know of the death of other party more than three months after the death will not ordinarily be sufficient for the Court's holding that the applicant had sufficient cause for not impleading the legal representatives within time. If the mere fact that the applicant had known of the death belatedly was sufficient for the Court to set aside the abatement, the legislature would have expressed itself differently and would not have required the applicant to prove that he was prevented by any sufficient cause from continuing the suit. The period of limitation prescribed for making such an application is three months, under Art. 177 of the First Schedule to the Limitation Act. This is a sufficient long period and appears to have been fixed by the legislature on the expectancy that ordinarily the plaintiff would be able to learn of the death of the defendant and of the persons who are his legal representatives within that period. The legislature might have expected that ordinarily the interval between two successive hearings of a suit will be much within three months and the absence of any defendant within that period at a certain hearing may

be accounted by his counsel or some relation to be due to his death or may make the plaintiff inquisitive about the reasons for the other party's absence. The legislature further seems to have taken into account that there may be cases where the plaintiff may not know of the death of the defendant as ordinarily expected and, therefore, not only provided a further period of two months under Art. 171 for an application to set aside the abatement of the suit, but also made the provisions of S. 5 of the Limitation Act applicable to such applications. Thus the plaintiff is allowed sufficient time to make an application to set aside the abatement which, if exceeding five months, be considered justified by the Court in the proved circumstances of the case. It would be futile to lay down precisely as to what considerations would constitute 'sufficient cause' for setting aside the abatement or for the plaintiff's not applying to bring the legal representatives of the deceased defendant on the record or would be held to be sufficient cause for not making an application to set aside the abatement within the time prescribed. But it can be said that the delay in the making of such applications should not be for reasons which indicate the plaintiff's negligence in not taking certain steps which he could have and should have taken. What would be such necessary steps would again depend on the circumstances of a particular case and each case will have to be decided by the court on the facts and circumstances of the case. Any statement of illustrative circumstances or facts can tend to be a curb on the free exercise of its mind by the Court in determining whether the facts and circumstances of a particular case amount to 'sufficient cause' or not. Courts have to use their discretion in the matter soundly in the interests of justice.

(13) It will serve no useful purpose to refer to the cases relied on for the appellant in support of its contention that the appellant's ignorance of the death of the respondent is sufficient cause for allowing its application for the setting aside of the abatement and that in any case it would be sufficient cause if its ignorance had not been due to its culpable negligence or mala fides. We have shown above that the mere statement that the appellant was ignorant of the death of the respondent, cannot be sufficient and that it is for the appellant, in the first instance, to allege why he did not know of the death of the respondent earlier or why he could not know about it despite his efforts, if he had made any efforts on having some cause to apprehend that the respondent might have died. The correctness of his reasons can be challenged by the other party. The Court will then decide how far those reasons have been established and suffice to hold that the

appellant had sufficient cause for not making an application to bring the legal representatives of the deceased respondent earlier on the record.

10. Shri Subramaniam contended that the Appellants have given absolutely no explanation as to what steps were taken to serve the aforesaid Respondents from 2001 after the Appeals were admitted on 5th September' 2001, till 2004. His contention is that had they taken any steps to serve, then obviously the Appellants would have come to know of the death of those Respondents. He points out that even the contention that prior to admission of the Appeals, the aforesaid Respondents were served with the copies of Memo of Appeal by Advocate's letter dated 6th August, 2001, is an utter falsity as all the aforesaid Respondents were already dead and there could not be any acknowledgment by them. He therefore submitted that in view of the aforesaid facts and circumstances, this Court ought to dismiss the above Chamber Summonses.

11. Shri Thakker, the learned counsel for the Respondents 13 A to 13 E and 14 fully adopted the arguments of Shri Subramaniam and prayed that the Chamber Summonses be dismissed.

12. After having heard all the learned counsels in the above, it is clear that as far as Respondent No. 10 is concerned the Appellants were aware his death from 24th June' 1999, but no steps were taken to bring the legal heirs till March' 2004. As far as Respondents 6, 8 and 9

are concerned, even the contention that they were served with the copy of Memo of Appeal through Advocate's letter dated 6th August' 2001, is apparently false, as all the aforesaid Respondents were already dead before that. Even though no Advocate was representing those Respondents in the above Appeals, no steps whatsoever were taken to serve those Respondents even after the Appeals were admitted on 5th September' 2001. For the first time an attempt was made in February' 2004.

13. Having regard to the above judgment of the Supreme Court and in view of the above facts and circumstances, and as no reasons leading to not knowing the death of the above Respondents within a reasonable time have been given, mere allegation of belated knowledge would not be sufficient, no details and particulars are given about the attempts made about finding about the legal heirs etc. no sufficient cause is made out. Under these circumstances, we are clearly of the view that the Appellants have not been diligent at all, and have been callous and absolutely no sufficient cause is made out for condoning the gross delay. Hence all the aforesaid three Chamber Summonses stand dismissed with costs.

(S. RADHAKRISHNAN, J.)

(J.P. DEVADHAR, J.)